No. 84-476 (4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT MCDONALD,
Petitioner,

v.

DAVID I. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the petition clause of the First Amendment provide absolute immunity from a common law action for libel when:

(a) the allegedly defamatory statements are relevant to the qualifications of the plaintiff, a candidate voluntarily seeking presidential nomination and appointment to a high federal office; and

(b) the statements are contained in private letters from an individual citizen to the President, with copies to a limited number of federal representatives and officials who had authority to take responsive action?

2. In these circumstances, if the petition clause does not provide absolute immunity, does it at least require increased protections, including judicial discretion to award costs and legal fees to an uninsured defendant if he prevails?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Cert. Pet. App. 1a-6a) is reported at 737 F.2d 427 (4th Cir. 1984). The opinion of the District Court for the Middle District of North Carolina (Cert. Pet. App. 7a-30a), is reported at 562 F. Supp. 829 (M.D.N.C. 1983).

JURISDICTION

The judgment of the Fourth Circuit was entered on June 28, 1984 (Cert. Pet. App. 31a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). Certiorari was granted November 26, 1984.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Respondent David I. Smith, an unsuccessful candidate for the office of U.S. Attorney for the Middle District of North Carolina, filed a common law libel action against petitioner Robert McDonald, seeking one million dollars in compensatory and punitive damages because of allegedly libelous statements, made during respondent's campaign, that directly concerned his qualifications for that office.[1] The statements were contained in two pri-

[1] It is undisputed that respondent was a candidate, and a public official or public figure. The complaint concedes that respondent "made application for" the position of U.S. Attorney. JA 4. The exhibits to the complaint, which were incorporated by reference as allegations of the complaint (JA 5), show that respondent had been a state court judge and had held other public offices. JA 9. In the District Court, respondent's attorney conceded that respondent was

vate letters from petitioner to President Reagan. JA 8-16. Copies allegedly were mailed to Senator Jesse Helms and Representative W. E. Johnston, who sat on the candidate "screening committee," [2] and to four other federal officials in the executive and legislative branches.[3] Respondent does not allege that the statements were communicated to the public or the press.

Although the complaint does not dispute the truth of many of the statements contained in petitioner's letters, it does allege that both letters contained false and defamatory statements which injured respondent's reputation and damaged his chances of appointment. It further alleges, although only in conclusory terms, that petitioner "knew that the statements were false and untrue" and acted out of malice towards respondent.[4] J.A. 4, 5.

"a public figure." Transcript of Oral Argument on February 4, 1983, at 31.

[2] Petitioner's February 13, 1981 letter to the President referred to and enclosed an article from the *Burlington Times News* of February 5, 1981 titled "Alamance Bar Association Endorses Smith For U.S. Attorney." JA 14. The article reported that Rep. Johnston "had formally recommended Smith for the post in a letter to Senator Jesse Helms, the senior senator on the screening committee," and that "Smith and Johnston are former law partners, and Johnston sits on the screening committee . . . ."

[3] The complaint alleges that the first letter, dated December 1, 1980, was also mailed to Rep. Barry M. Goldwater, Jr., of California; Rep. Jack Kemp; and Edwin Meese, as Chairman of the Transition Team and as Chief Counselor to the President. JA 4, 16. The complaint alleges that the second letter, dated February 13, 1981, was also mailed to Rep. Goldwater; Edwin Meese; and William Webster, Director of the F.B.I. JA 5. Edwin Meese was directly responsible to the President for evaluating potential presidential appointments. William Webster was authorized by statute to investigate the backgrounds of candidates for high federal office, including the office of U.S. Attorney. See n. 74, *infra*.

[4] Petitioner's answer denied that the statements were false or that petitioner knew they were false. Answer ¶¶ 12, 18. Respondent does not specifically allege that the letters were written "with reckless disregard" for the truth, perhaps because the letters provided, on their face, a ready means for evaluating the truth of most of the

In the first letter, petitioner requested an opportunity "to appear at any hearing related to the selection process" in order to testify publicly about respondent's qualifications. JA 12. Both letters strongly criticized respondent's conduct as a public official and as an officer of the court. For example, the first letter stated that as a state court judge, respondent "showed the tremendous lack of regard he has for the law, the civil rights of individuals, and our system of justice in general." JA 10. As an illustration, petitioner stated that respondent had "summarily imprisoned" a black attorney:

> "In the matter of black attorney, Sidney Verbal, Esq., an equally vile action took place. David I. Smith was presiding over a case in Charlotte, N.C. and Sidney Verbal was representing one of the litigants. Verbal arrived at the hearing some 18 minutes late, was permitted no explanations, was found guilty of contempt, and summarily imprisoned in the Mecklenberg County jail. Verbal appealed the matter in the North Carolina Circuit Court of Appeals, and the decision was reversed. A report on that case is enclosed." JA 10.[5]

This letter also stated that petitioner had been personally aggrieved by respondent's abuse of his authority as an officer of the court. After noting (these facts are not disputed) that respondent had represented, on "a con-

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statements contained therein by supplying names, addresses, and telephone numbers of persons present at the time, and citations to court records and newspapers articles.

[5] Respondent claims these statements were knowingly false and defamatory. JA 5-6. The case report petitioner enclosed is reported, *State of North Carolina v. Sidney Verbal II*, 41 N.C. App. 306, 254 S.E.2d 794 (1979). The appellate court found that Verbal had been "sentenced [by respondent] after a summary proceeding to two days' imprisonment for being eighteen (18) minutes late in returning to Court after a luncheon recess . . . ." 254 S.E.2d at 795. Citing a N.C. statute which required "a summary opportunity to respond," and finding that "[n]othing in the record before us indicates that the alleged contemnor was given any opportunity to be heard," the appellate court reversed respondent's order of imprisonment. *Ibid.*

tingency fee basis," a client who sued petitioner for substantial damages on "a claim of slander," the letter stated that "when he was attorney for the plaintiff" in that case, respondent "did, in fact, wilfully withhold crucial evidence then in his possession that had been ordered to be produced by the court." JA 11. It stated further that the federal court had ultimately dismissed that complaint, finding it "was brought without merit and pursued in a dilatory manner causing vexation to both [petitioner] and the court," and fining respondent's client "$1000 for failure to respond to discovery orders . . . ."[6] JA 11-12. And it noted that the "costs for

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[6] Respondent claims these statements were knowingly false and defamatory. JA 5-6. The files of the U.S. District Court, M.D. N.C., Greensboro Div., regarding *Richardson v. Colonial Pre-Schools & Kindergartens, Inc., Robert McDonald and Wife, Lulu McDonald,* No. C-75-52-G, show that until July 9, 1976, respondent did represent the plaintiff in that action against petitioner. Magistrate Herman Amasa Smith found that "the record taken as a whole suggests an action brought without basis and pursued in an unorthodox and dilatory manner, burdening not only the defendants but the court." He ordered plaintiff to pay defendants $1,000 as a sanction for the costs and fees "incurred in connection with obtaining and attempting to enforce the court's orders with respect to discovery." *See* Magistrate's Memorandum and Recommendation filed June 3, 1977 at 12. Earlier, in a Magistrate's Memorandum and Recommendation filed January 6, 1977, the Magistrate noted that his December 30, 1975 Order directing plaintiff to produce her income tax returns had been issued only "after another admonition to counsel for the plaintiff," and had still not been obeyed. *Id.* at 2. He referred to yet another discovery order, issued September 2, 1975, and noted that "in spite of that warning, counsel for the plaintiff has failed also to comply with that order." *Ibid.* With respect to the slander count of the complaint, the Magistrate concluded that "[a]fter extensive discovery, evidence produced by plaintiff is insufficient to support allegations of actionable slander of the plaintiff by the defendant Robert McDonald," and concluded further that "there is no evidence of any actual malice or bad faith on the part of the defendant Robert McDonald with respect to such statements. Further, the evidence appears to support a good faith belief by the defendant McDonald in the truth of the statements attributed to him." *Id.* at 6-7. On the Magistrate's recommendation, the court granted McDonald summary judgment on plaintiff's slander claim.

legal fees and expenses" for defending that action "exceeded $75,000," and that petitioner could not recover those costs, even though he had prevailed. JA 11. Petitioner was thus personally aware that even a successful defense to a defamation action can cost a defendant thousands of dollars.

The letter also stated that prior to filing that earlier action, respondent had said he "had enough on defendant R. McDonald to put him in Atlanta for life." JA 11. Petitioner was obviously concerned that a lawyer who had threatened to put him in prison for life might acquire the federal prosecutorial authority to pursue that threat.

Thus, because he was personally aggrieved and concerned, and also because he was a "politically active American, and staunch California Republican," JA 8, who did not "want any Watergate-type attorneys in powerful places this time," JA 12, petitioner wrote his President to urge that respondent not be appointed.

The complaint was filed in state court in North Carolina. Petitioner removed the case to the United States District Court for the Middle District of North Carolina on grounds of diversity of citizenship. He moved for judgment on the pleadings on the ground that the petition clause of the First Amendment provides absolute immunity from common law libel actions. Petitioner also argued that even if private communications from a citizen to his President are not absolutely immune from such actions, citizens sued as the result of such communications are entitled to special protections, including judicial discretion to award costs and legal defense fees should they ultimately prevail.

The District Court agreed with petitioner that the First Amendment right to petition is applicable to the states and imposes limits on the state's power to vindicate reputation through its common law of defamation. It also agreed that

> "decisions interpreting the 'speech' clause of the first amendment do not necessarily control cases concern-

> ing the 'petition' clause. For, as Chief Justice Marshall once stated, '[i]t cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'" 562 F. Supp. at 836; Cert. Pet. App. 17a.

The District Court held that petitioner's allegedly defamatory communications fell "within the general protection afforded by the petition clause," 562 F. Supp. at 838-39; Cert. Pet. App. 21a, but concluded that the petition clause does not provide absolute immunity from common law libel actions. Instead, relying on this Court's 1845 decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the District Court held that the petition clause provides only a qualified privilege. 562 F. Supp. at 840; Cert. Pet. App. 23a. Petitioner appealed to the Fourth Circuit, which affirmed, also relying on *White v. Nicholls*. 737 F.2d at 429; Cert. Pet. App. 3a.

SUMMARY OF ARGUMENT

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court ruled that the speech and press clauses of the First Amendment afford qualified immunity, but not absolute immunity, from common law libel suits brought by public officials. This case, however, arises under the petition clause. It presents the Court with its first opportunity to consider whether a private petition from a citizen to his President, which serves a unique self-governmental function, requires greater immunity from common law libel suits than does a newspaper's speech to the public. Deciding whether the state's interest in protecting individual reputation is sufficient justification for abridgment of the substantial federal interests protected by the petition clause is made considerably easier in the circumstances of this case because of the very narrow rule sought by petitioner.

First, petitioner does not ask this Court to rule that the petition clause provides absolute immunity from common law libel actions for every statement he might make

in a petition to the federal government. The undisputed facts of this case show that all of the allegedly defamatory statements "touched on" and were relevant to how respondent would exercise the governmental power sought by him, and were contained in a private petition to federal officials who had authority to take responsive actions.[7]

Second, the Court need not decide whether a private petition would be absolutely immune from a federal criminal action for providing false information to the government.[8] Petitioner claims immunity only from common law libel actions.

Unlike the more general freedoms of speech and press, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people. When the First Amendment was adopted, the right to petition already

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[7] Thus, in order to resolve this case, this Court need not rule that the communication of knowingly false information about irrelevant details of a public official's private life, or the communication of knowingly false information to the general public, or to officials who are not even arguably in a position to take responsive action, is absolutely immune from common law libel actions.

[8] As this Court has recognized, in several respects a criminal prosecution for providing false information to the government would be less likely to deter protected speech than would a common law libel action. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.") Unlike criminal actions, where the government is presumably disinterested and does not seek financial gain, common law actions are brought by "self-perceived victims" who do seek financial gain. *Herbert v. Lando*, 441 U.S. 153, 204 (1979) (Marshall, J., dissenting). Not infrequently, such common law actions claim huge damages and engage in probing pre-trial discovery for the *"in terrorem"* purpose of forcing an early and lucrative settlement. *Ibid.* In addition, criminal actions would at least provide the "ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt." *Sullivan*, 376 U.S. at 277. And if indigent, a criminal defendant would be afforded free counsel.

had a rich and ancient history, and a well understood governmental function. In that history, the right to petition had been linked with a rule of absolute immunity for petitioners. That common law rule, well established in England and colonial America, was confirmed in *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802), the earliest American case to consider the issue.

The Framers designed a limited government, in which each branch would check and balance the others, and in which the people, as the ultimate sovereign, would check and balance all of the organized institutions of government. They understood that the checking balance between the people and their government requires a right to petition with immunity, and that governmental limitations on the right to petition would threaten that balance and would intrude upon the fundamental concept of popular self-government.

The right to petition serves this self-governmental function by providing citizens a means of direct, unmediated access to governmental decision-makers. It enables citizens to inform government of facts or political opinions necessary for a responsive and responsible system of representative government, and also to check abuses of governmental power by criticizing governmental plans or actions. Both the informing and critical functions of petitioning would be severely undermined without a rule of absolute immunity.

Because petitioning, unlike speech, is a direct exercise of a self-governmental function, it is entitled to the same rule of absolute immunity from state common law libel actions that is afforded governmental functions performed by members of the executive, legislative and judicial branches. For ordinary citizens, even more than for federal officials, the ruinous prospect of having to spend literally thousands of dollars in unrecoverable costs and fees to defend against a conclusory allegation, easily made, that the information they communicated to government was "knowingly false," would so chill exercise of their right to petition as to be the functional equivalent

of a prior restraint. Furthermore, because the right to petition the national government concerning the qualifications of an individual actively seeking appointment to a high national office is an essential element of national governance, such petitions cannot be subject to any state restriction whatsoever.

Even if balancing of federal and state interests is deemed appropriate, in the circumstances of this case, the state's attenuated interest in protecting the reputation of a candidate for high federal office is not sufficiently compelling to justify the restraint on would-be petitioners caused by the prospect of having to defend against a common law libel action. The federal interests are particularly strong in this case, where anything less than absolute immunity would necessarily subject the President and other high federal officials—the sole recipients of the letters—to burdensome and probing depositions in order to determine whether respondent was, in fact, defamed or injured.

Finally, if the state interest justifies some restraint, the Court should fashion procedures that will minimize the restraint as much as possible.

ARGUMENT

I. GIVEN THE FRAMERS' UNDERSTANDING OF THE ABSOLUTE NATURE OF THE COMMON LAW RIGHT TO PETITION THE KING AND PARLIAMENT, AND THEIR CLEAR INTENTION TO AFFORD AMERICAN CITIZENS EVEN GREATER RIGHTS TO PARTICIPATE IN SELF-GOVERNMENT THAN HAD BEEN ENJOYED BY BRITISH AND COLONIAL SUBJECTS, THE PETITION CLAUSE MUST BE INTERPRETED TO PROVIDE ABSOLUTE IMMUNITY WHEN A PRIVATE CITIZEN PETITIONS HIS PRESIDENT.[9]

When the petition clause was drafted, the "right of the people" to "petition the Government" for redress of

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[9] Decisions of this Court concerning the scope of immunity "from civil damages liability have been guided by the Constitution, federal

grievances was far older and more clearly established than, and functionally quite different from, the more general freedoms of speech and press.[10] The Framers understood that freedom of speech and press were relatively new ideals, relating directly to the character of the new American society they intended to create, but only indirectly to government *per se*. They also understood, however, that throughout its long history, petitioning had served the special function of providing a direct means of popular participation in self-government. Both the English and colonial common law contemporaneous with adoption of the petition clause recognized the special function of petitioning and afforded petitioners absolute immunity from libel actions. Thus, under the common law known to the Framers, this case would have been governed by a rule of absolute immunity. Certainly the Framers did not intend in the petition clause to narrow the protections historically attached to the right to petition.

Although this Court has had frequent occasions to interpret the speech clause, it has not had similar occasion to examine the history and meaning of the petition clause.[11] Resolution of this case, however, requires such

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statutes, and history." *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982). History includes "common law." *Ibid.* Absent explicit constitutional or statutory direction, the Court "also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government." *Id.* at 747-48. Because there are no relevant federal statutes, the decision in this case must be guided by common law and constitutional history, and by the public policy concerns implicit in the constitutional structure of our government.

[10] Petitioning is described as "the right" of "the people." Freedom of speech is described only as a limit on Congress' lawmaking authority. The concept of a "right" existing in the "people" apart from, and prior to, the constitution of a government is a critical feature of any interpretation of the petition clause. *See* Pierce, *Maryland's Summary Judgment Procedure in New York Times Defamation Cases*, 40 *Md. L. Rev.* 638, 664 (1981).

[11] In *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967), *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937),

an examination. That examination will show that petitioning functions as, and was understood to be, a direct embodiment of popular sovereignty, intended as a check on the formal institutions of government. Governmental limitations on the right to petition are therefore direct intrusions upon popular self-government.

A. The Ancient Right To Petition Is The Historical Basis For Most Of The Constitutional Institutions Of Self-Government, And Is Directly Linked To The Concept Of Immunity.

The right to petition and the concept of immunity share a common history in Parliament's struggle to assert against the King its claim to be the embodiment of the popular will and the ultimate law-making authority. A petition is a complaint to and often about government; without immunity, the petitioner could be charged with seditious libel. For that reason, development of the right to petition was inseparably linked to development of immunity for both public petitioners—members of Parliament—and private petitioners.

1. *The British tradition of petition/immunity.*

The right to petition, which was the common root of both the legislative bill and the judicial complaint, was first formally expressed in the Magna Carta of 1215, in which King John promised

> "that if we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offence be

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and *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1876), brief mention was made of the right to petition, but no detailed interpretation was presented. More recently, the Court has had occasion to consider the significance of the right to petition in the context of interpreting the reach of federal antitrust statutes. *See California Motor Transport v. Trucking Limited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961).

> notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, *petition to have the transgression redressed* without delay." [12]

From this right to petition emerged the parliamentary privilege of initiating legislation, or "bills." "The words petition and bill were used interchangeably in legal and common language down to Tudor Times." [13] From the right to petition also emerged the judicial complaint. Indeed, "parliament was a court of a very special kind," and the "one constant attribute of parliament, so far as our evidence goes, was, for the better part of a century, the hearing of private petitions, petitions which in most instances asked for justice." *H. Richardson and G. Sayles, The English Parliament in the Middle Ages*, ch. XXVI, pp. 41, 43 (1981).

Until the fifteenth century, legislative petitioning was tied to parliamentary satisfaction of the King's financial needs. The King called assemblies of Parliament to meet those needs, but Parliament conditioned appropriations on the granting of its petitions. In 1414, however, Parliament asserted itself as the sole source of legislative authority: the House of Commons declared itself "as well

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[12] McKechnie, *Magna Carta* 467 (2d ed. 1914) (emphasis added). The next line shows the early link between the right to petition and the concept of self-governance, and shows that petitions were not mere requests for royal favor; the King and the Barons both expected that petitions would be honored:

> "And if we shall not have corrected the transgression . . . within forty days . . . the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit . . . and when redress has been obtained, they shall resume their old relations towards us. *Ibid.*

[13] Smellie, *Right of Petition*, 12 *Encyclopedia of Social Sciences* 98 (1934).

assentires as petitioners;" the King responded in the following terms:

> "The King of his grace especial granteth that fro hens forth no tyhng be enacted to the Petitions of his Commune, that be contrarie of hir askyng, wherby they shuld be bounde withoute their assent." [14]

By the fifteenth century, then, through the device of the petition, Parliament had achieved the sovereign authority to initiate and enact legislation.

Absolute Parliamentary immunity from judicial and executive retaliation for petitioning/legislative activities developed simultaneously with the right itself. Immunity from executive inquiry was first formally expressed in 1399;[15] immunity from judicial inquiry in 1512.[16] By 1541 immunity for members of Parliament was asserted as one of the "ancient and undoubted rights and privileges" by the Speaker of the House of Commons at the commencement of each session of Parliament.[17]

For the next hundred years, however, there were periodic violations of parliamentary immunity, followed always by vigorous protests by Commons. The final violation occurred in 1629 in a judgment by the King's

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[14] *See* Smellie, *supra* n. 13, at 98; *see also Adams & Stephens, Select Documents of English Constitutional History* 181-82 (1916).

[15] In 1397, Sir Thomas Henry was condemned by Richard II for introducing a bill to reduce the expenses of the royal household. In 1399, in response to petitions filed by both Henry and the House of Commons, Richard II's successor reversed and annulled the condemnation as against parliamentary rights. *See* Veeder, *Absolute Immunity In Defamation: Legislative and Executive Proceedings*, 10 *Colum. L.J.* 131, 132 n. 4 (1910).

[16] In that year an Act was passed condemning as void all legal proceedings against members "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of." 4 Hen. VIII, ch. 8; cited in Veeder, *supra* n. 15, at 132.

[17] Veeder, *supra* n. 15 at 132.

Bench against nine members.[18] That judgment was formally reversed by the House of Lords in 1667.[19] In the Bill of Rights of 1689, Parliament definitively declared "[t]hat the Freedom of Speech, and Debates as Proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 W. & M. Sess. 2, c. 2.

As the parliamentary petition evolved into the contemporary legislative bill, there developed a simultaneous and related tradition of direct private petitioning to the King. These private petitions involved grievances requiring both judicial and legislative solutions. Although many of the former were referred to the courts—the predecessor to the modern complaint—the latter were caught in the competition between King and Commons. By the fourteenth century, "the House of Commons attempted to secure that all petitions involving a change of law should be determined by themselves." [20] This was the source of the private bill.

Following the pattern of parliamentary petitioning, private petitioning was linked to a formal concept of absolute immunity in the latter part of the seventeenth century. In 1669 Commons resolved:

> "That it is an inherent right of every commoner of England to prepare and present Petitions to the house of Commons in case of grievances . . . . That it is the undoubted right and privilege of the Commons to judge and determine concerning the nature and matter of such Petitions . . . .
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> *That no court whatsoever hath power to judge or censure any Petition presented to the house of Commons,* and received by them, unless transmitted from thence . . . ." [21]

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[18] Veeder, *supra* n. 15 at 133.

[19] Veeder, *supra* n. 15 at 134.

[20] Smellie, *supra* n. 13, at 98.

[21] 4 Parl. Deb. (1st ser. Cobbett) 432-33 (1669) (emphasis added), *quoted in* Fellman, *Constitutional Rights of Association,* 1961 *Sup. Ct. Rev.* 74 at 79.

This principle was given formal judicial recognition in *Lake v. King*, 1 Saund. 131 (1680), in which a libel action had been founded on a petition presented to a committee of Parliament, accusing the vicar general of using his office for extortion. The court held that a libel action could not be based upon a petition to a committee of Parliament that had power to redress the grievance: "The exhibiting of the petition to the committee of parliament was lawful, and no action lies for it, *although the matter contained in the petition was false and scandalous* because it is in a summary course of justice, and before those who have power to examine whether it be true or false." *Lake v. King*, *supra* at 139 (emphasis added).

Although Commons and the courts had established a rule of absolute immunity which protected the people's right to petition Parliament, no similar immunity protected the people's right to petition the King until after the *Seven Bishops* case of 1688, *State Trials* XII, 183. In that case, the Bishops were tried for seditious libel after petitioning the King to protest a royal proclamation. Despite a judge's instruction that "no man can take upon him to write against the actual exercise of the government, unless he have leave from the government, but he makes a libel, be what he writes true or false," the jury acquitted the Bishops.[22] The immunity conferred by the jury was given formal recognition the next year in the Bill of Rights: "[I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." [23]

English history demonstrates that the right to petition was the source of most of the institutions of constitutional self-government, including public legislation by a representative body, initiation of judicial proceedings, private bills, and the concept of immunity, both for individuals and for representatives. The American colonists were

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[22] State Trials XII, pp. 183, 427.

[23] Smellie, *supra* n. 13, at 99.

well aware of the dangers of petitioning without immunity.[24] They also understood the close tie between the right to petition and the concept of popular sovereignty. This entire complex of ideas was carried over into American institutions and theories of government.

2. *The Colonial tradition of petition/immunity.*

The right to petition with immunity was recognized in the American colonies as both a common law right of all British subjects and a "natural right" inherent in republican government. The former concept was expressed in numerous revolutionary declarations. Thus, in its Declaration of Rights and Grievances, the Stamp Act Congress of 1765 stated "[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament." [25] The Declaration and Resolves of the First Continental Congress (1774) expressly stated "[t]hat they [the colonists] have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." [26]

The natural right concept of the right to petition was effective within the colonial systems of government themselves. For example, the Massachusetts Body of Liberties of 1641 declared that

> "[e]very man, whether Inhabitant or forreiner, free or not free, shall have libertie to come to any publique Court, Councel or Towne meeting, and either

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[24] A vivid example occurred in 1768 when the Massachusetts Assembly petitioned the King to protest the Townshend Acts. In response, the British Secretary of State for the colonies demanded that the Assembly rescind its petition. When it refused, he dissolved the Assembly. *See R. Perry and J. Cooper, Sources of Our Liberties* 280 (1959).

[25] 1 *B. Schwartz, The Bill of Rights—A Documentary History* 198 (1971).

[26] *Id.* at 217.

> by speech or writeing to move any lawfull, seasonable and material question, or present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner." [27]

This example reflects what was clear in both England and America: petitioning offered a means of access to and participation in government far broader than the limited reach of contemporary suffrage.[28] This was of particular importance in the American colonies' relationship to Parliament. Because the colonies had no representatives, they relied extensively on petitions,[29] which were vigorously defended as a means of participation in government broader than suffrage or representation per se.[30]

The colonial assemblies received so many petitions that they had to establish methods for responding to them. Petitions directly from the people were labelled "griev-

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[27] *Id.* at 73.

[28] That this continued to be the case even after adoption of the Constitution is vividly demonstrated by the petition received from the Cherokee Indians protesting their forced removal from Georgia to Oklahoma, see M. Wardell, *A Political History of the Cherokee Nation* 364-65 (1938), and from freed slaves protesting the fugitive slave laws, see 6 Annals of Congress 16-18 (January 30, 1797) (remarks of Rep. Swanwick of Pennsylvania).

[29] For example, Rhode Island petitioned Parliament to protest the Molasses Act of 1733. In response to the Stamp Act (1765), Virginia, New York, and Rhode Island all submitted petitions to Parliament and/or the King. In 1768, Massachusetts petitioned the King to protest the Townshend Act. *D. Smith, The Right To Petition For Redress of Grievances: Constitutional Development And Interpretations* 56-63 (University Microfilms) (unpublished thesis).

[30] *See, e.g.*, the remarks of Sir John Bernard speaking in Parliament in support of a petition from Rhode Island protesting the Molasses Act of 1733, noting that except for petitions, the colonists "have no other way" of protecting their interests. IV *E. B. Greene, The American Nation: A History* 186 (1905), *citing* Corbett, *Parliamentary History*, Vol. VIII, pp. 1261-66.

ances," and were often directed to a "committee of grievances." [31] Once received by the Assembly, grievances could result in legislation, in adjudicative proceedings, or in direct petitions by the Assembly to the King. Because no strict distinction was drawn between the legislative and judicial functions of the colonial Assembly, grievances against government officials could result in judicial proceedings before the Assembly. Witnesses in such proceedings, including the individuals who had filed the grievance, were afforded immunity.[32] This immunity was the American source of what later became the immunity afforded participants in judicial and legislative proceedings.

By the time of the Revolution, the right to petition was central to the American concept of self-government. The Declaration of Independence describes the breakdown of the petitioning process as an affront to a "free people:"

> "In every state of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant is unfit to be the ruler of a free people." [33]

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[31] Such committees were established in Virginia in 1683, in Maryland in 1669, in New York in 1699, and in Pennsylvania in 1682. *See M. Clarke, Parliamentary Privilege in the American Colonies* 210-14 (1943).

[32] *Id.* at 115.

[33] A similar reliance on the right to petition as a ground for the assertion of self-government is found in the preamble to the Declaration and Resolves of the First Continental Congress: "[W]hereas, assemblies have been frequently dissolved, contrary to the right of the people, when they attempt to deliberate on grievances; and their dutiful, humble, loyal and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's Ministers of State." *B. Schwartz, supra* n. 25, at 216. Also, the Declarations of Rights enacted by state conventions frequently included a right to petition. *See, e.g.*, the Pennsylvania Declaration of Rights (1776), *id.* at 266; Delaware Declaration of

Harris v. Huntington, 2 Tyler 129 (Vt. 1802), the earliest judicial analysis in the United States of the common law immunity accorded petitioning, shows that the common law principle of absolute immunity for petitioners, clearly expressed in *Lake v. King*, *supra*, was understood to be the rule in this country.[34] *Harris v. Huntington* involved facts strikingly similar to the present case. The defendant had filed a petition with the Vermont legislature complaining of plaintiff's actions as a justice of the peace and asking the legislature to deny his reappointment. Plaintiff brought a libel action alleging false and malicious statements. Defendant claimed that absolute immunity attached to petitioning activity under the common law and the Vermont Bill of Rights.[35] Because the court thought of the issue as "a question of greater magnitude, and more interesting to the people of Vermont than any which has hitherto agitated in this Court," *id.* at 135, it analyzed the common law in great detail. Citing *Lake v. King*, *supra*, which the court described as holding that no cause of action would lie because the petitioner there "had presented his petition to a committee appointed by the commons . . . who had full power to hear and redress the grievance complained of," *id.* at 138, the court concluded that the defendant's actions were absolutely immune:

Rights (1776), *id.* at 277; North Carolina Declaration of Rights (1776), *id.* at 287; New Hampshire Bill of Rights (1783), *id.* at 379.

[34] This was so even though absolute immunity was again under attack in England in the late 1790's. Petitioning in the late 1790's had taken on a mass political dimension in England, which invoked a harsh parliamentary response. In response to an assembly of 150,000 persons petitioning for parliamentary reform, the removal of certain ministries, and termination of the war with France, Parliament had passed a law outlawing meetings of more than 50 persons, held to petition the King, "except in the presence of a magistrate with authority to arrest everybody present." *Brandt, The Bill of Rights*, 245 (1965).

[35] The Vermont Bill of Rights provided: "[T]hat the people have a right to apply to the legislature for redress of grievances, by

> "An *absolute and unqualified immunity* from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it.
>
> And it would be equally destructive of the right, for the Courts of Law to support actions of *defamation* grounded on such petitions as libellous." *Id.* at 139-40 (emphasis added).

The court then explained its holding with reasoning equally applicable here:

> "Petitions for redress of grievances will generally point to officers of the government, who have or may be supposed to have abused its confidence by mal-administration; and although government should refrain from prosecuting the petitioners criminally, yet it would operate as effectual a restraint upon them to expose them to an action for damages at the suit of those of whose conduct they have complained to government." *Id.* at 140.

The court's opinion demonstrates that the *Seven Bishops* case was well known in this country, as were the Crown's repeated attempts to violate the immunity attaching to petitioning. *Id.* at 141-42. It shows also that abuse of the right to petition was understood as a cause of the English Revolution of 1688, just as it had been cited as a justification for the American Revolution in the Declaration of Independence.

Finally, the court explicitly ruled that the public welfare requires absolute immunity for petitioning, *even if* exercise of that right sometimes causes injury to reputation:

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address, petition, or remonstrance." *Harris v. Huntington*, 2 Tyler at 143. The petition clause in the federal constitution provided even broader protection. It protected petitions to "the Government," not just to "the legislature."

> "But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare." *Id.* at 146.[36]

In sum, under *Harris v. Huntington*, the earliest American case to consider the issue, the common law rule adopted in this country afforded absolute immunity for private petitioning.

The courts below thought this case was "governed" by this Court's decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), which correctly viewed the common law immunity available to individuals who petition the President as coextensive with that available to participants in judicial proceedings, but incorrectly understood both to extend no further than a qualified privilege.[37] With respect to judicial proceedings, this conclusion has been widely and justly criticized;[38] similar criticisms apply to the conclusion with respect to petitioning the President.

In *White*, the Court did not even purport to address the constitutional protection afforded petitioning activity, so *White* certainly does not "govern" the issue before this Court. But neither is *White* an accurate analysis of the

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[36] The court's equation of defamatory petitions with "other evils in government" reflects the contemporaneous understanding that petitioning is an act of self-government.

[37] "The privilege spoken of in the books . . . signifies this, and nothing more; that the excepted instance shall so far change the ordinary rule, with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice . . ." 44 U.S. at 287.

[38] See *Briscoe v. LaHue*, 460 U.S. 325, n. 12 (1983); *Johnson v. Brown*, 13 W. Va. 71 (1878); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 *Colum. L. J.* 463, 465-66 (1909).

common law understanding of the right to petition at the time of the adoption of the First Amendment.

The common law cases cited in *White* do not support its general conclusion on the complete absence of absolute immunity, or its narrow conclusion on the absence of such immunity for petitioning the President.[39] *White* dismisses *Lake v. King*, *supra*, as an "anomalous decision," but cites no other decision on point.[40] *White* does not distinguish or even mention *Harris v. Huntington*, *supra*, although counsel for defendant had relied upon that case.[41] *Id.* at 282. *White* relies exclusively on the

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[39] For its general conclusion, *White* cites several cases that do not involve governmental functions at all, but rather, private issues such as whether an action can be brought by an employee against his employer for comments about his qualifications. *Cockayne v. Hodgkisson*, 5 Car. Pa. 543; *Wright v. Hawkins*, 1 T.R. 110; *Child v. Affleck*, Barn. Cress. 406. None of these bears on the scope of immunity for government proceedings or functions. *White* incorrectly relies on *Johnson v. Evans*, 3 Esp. 32, which, in fact, held that words spoken in "the course of legal or judicial proceedings [cannot] support an action for slander." *White* also confuses the issue of immunity for publication of a report of judicial proceedings, with that for statements during such proceedings. *Curry v. Walter*, 1 Bos. Pul. 525; *Rex v. Fisher*, 2 Camp. 563; *Rex v. Crevy*, 1 M. S. 273; *Delegal v. Highly*, 3 Bing. N.C. 690; *Lewis v. Walter*, 4 Barn. & Ald. 605; *Flint v. Pike*, Barn. & Ald. 473.

[40] In fact, *Lake v. King* is the only pre-Revolutionary case cited in *White*. Had the Court examined other pre-Revolutionary sources, it could not have described *Lake v. King* as "anomalous." It is true, as noted above, that starting in the late 1790's and continuing well into the 1800's, the right to petition was again under attack in England. Indeed, in the 1830's, the right to petition for the abolition of slavery was under attack in Congress by Sen. Calhoun and other proponents of slavery. See the Appendix to this brief. The Court, writing in 1845, was certainly aware of that relatively recent history. But the Framers were not aware of that history and the petition clause should not be interpreted as if they were.

[41] *White* cites just two American cases. The first, *Commonwealth v. Clapp*, 4 Mass. 169 (1808), had no relation whatever to petitioning activity—it involved an allegedly libelous statement made in a sign posted in a public place. The second, *Bodwell v. Osgood*, 3 Pick 379 (1825), involved an action based on a letter to a local school committee concerning the plaintiff—a teacher employed by

position urged by Chancellor Kent in his Commentaries. As the Court acknowledges, Kent relied largely on the English case of *Fairman v. Ives*, 5 Barn. & Ald. 642 (1822). But *Fairman* did not involve petitioning to complain about governmental wrongdoing; it involved a letter to the Secretary of War concerning a private debt owed by an individual under his command. Further, the Court fails to recognize that Kent's position had been rejected by the New York Court of Errors, on which he sat. In *Thorne v. Blanchard*, 5 Johns 508 (1809), Kent was forced to dissent on whether a petition to the New York Council of Appointment seeking removal of a public officer would support a cause of action for libel. The reasoning of Sen. Clinton—one of the judges constituting the majority denying a cause of action—is particularly relevant here. Describing the right to petition as a "right essential to the very existence of a free government [and] necessarily connected with the relations of constituent and representative," *id.* at 528, he concluded:

> "The freedom of inquiry, the right of exposing maladversion in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in case of that, or of an analogous nature." *Id.* at 530.

Thus, the historical materials show that at the time of the adoption of the First Amendment, petitioner's letters to the President would have been absolutely immune from libel actions.

B. The Framers Clearly Intended The People, As The Ultimate Sovereign, To Have Even Greater Rights To Participate In Self-Government Than Had Been Enjoyed By British And Colonial Subjects.

The people-at-large have a unique place in our constitutional scheme. As Madison explained in his Report on

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that committee. Whether the case was viewed as involving a petition to local government, or simply a complaint to an employer, is not clear.

the Virginia Resolution, "[t]he people, not the government, possess the absolute sovereignty."[42] 4 *Elliot's Debates On The Federal Constitution* (1876) at 569. Madison recognized this as the essential difference between the British and American forms of government: in England, "all the ramparts for protecting the rights of the people . . . are not reared against Parliament. . . . They are merely legislative precautions against Executive usurpation." *Ibid.* In the United States, by contrast, "the great and essential rights of the people are secured against legislative as well as executive ambition."[43] *Ibid.* Petitioning was viewed as one such "right" and one such "rampart."

Just as petitioning played a critical role in developing the British concept of parliamentary sovereignty, it played a critical role in developing post-revolutionary America's expanded concept of popular sovereignty. The American counterpart to the struggle between Parliament and King was the struggle between the people-at-large and government itself.[44] Petitioning came to be seen as the direct expression of the people's sovereignty, which served as a necessary check on the formal institutions of government.

The right to petition was therefore closely associated with the controversy over the constituents' right to "instruct" their representatives.[45] This controversy was

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[42] Quoted with approval in *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964).

[43] This Court has noted that our "form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects," and therefore requires even greater freedom for the people. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964).

[44] See the discussion of the "people out-of-doors" in G. Wood, *The Creation of the American Republic, 1776-1787*, 319-28 (1969).

[45] The right of instruction was already contained in several state constitutions. Pennsylvania Declaration of Rights (1776), North

part of the extensive post-Revolution reconsideration of the legitimacy of representative institutions in a popular democracy: "There is scarcely a newspaper, pamphlet, or sermon of the 1780's that does not dwell on this breakdown of confidence between the people-at-large and their representative governments." [46]

The petition clause was debated in the House of Representatives of the First Congress on August 15, 1789.[47] There was universal agreement that a self-governing people must at least have the right to *request* governmental action, through petitions. The only issue was whether the concept of self-governance also required that the people be able to *compel* governmental action, through "instructions." The debate therefore focused almost exclusively on whether to add a right to instruct to the right to petition.[48] The practice of instruction was defended as an inherent right of a self-governing people.[49]

Carolina Declaration of Rights (1776), New Hampshire Bill of Rights (1783). *See* Schwartz, *supra* n. 25 at 216.

[46] G. Wood, *supra* n. 44, at 368.

[47] No record was kept of the Senate debate, which occurred on Sept. 4, 1789. B. Schwartz, *supra* n. 25, at 146.

[48] The petition clause had been recommended by North Carolina and Virginia, both of which had also recommended "a declaration that the people have a right to instruct their representatives." 1 Annals of Congress 732 (Aug. 15, 1789) (Remarks of Mr. Tucker).

[49] "Our Government is derived from the people, of consequence the people have a right to consult for the common good; but to what end will this be done, if they have not the power of instructing their representatives." 1 Annals of Congress 734 (Remarks of Mr. Page). Similarly, Mr. Gerry stated: "The friends and patrons of the constitution have always declared that the sovereignty resides in the people . . . . to say that sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree." *Id.* at 737. *See also id.* at 744 (instruction "was strictly compatible with the spirit and nature of the Government; all power vests in the people of the United States; it is therefore, a Government of the people, a democracy. If it were consistent with the peace and tranquillity of the inhabitants,

The critical opposition to this position turned largely on an even broader principle of popular sovereignty: because the Constitution had been adopted through an extraordinary process by the people-at-large, instructions from a particular constituency could not bind a representative to act in an unconstitutional manner, *i.e.*, contrary to the collective will of the people.[50]

As even those in favor of instruction admitted, representatives must be free to judge whether to obey an arguably unconstitutional instruction.[51] Once it was conceded that instructions could not be binding, the distinction between instructions and petitions collapsed. Both served the same self-governmental function of allowing direct involvement by the people-at-large in the deliberations and decision-making processes of government.

Madison made clear that the right to petition encompassed the virtues, but not the vices, of instructions:

> "[T]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as the delegates are obliged to conform to those instructions, the declaration is not true." 1 Annals of Congress 738. (Aug. 15, 1789).

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every free man would have a right to come and give his vote upon the law; but inasmuch as this cannot be done . . . the people have agreed that their representative shall exercise a part of their authority. To pretend to refuse them the power of instructing their agents [denies] them a right.") (Remarks of Mr. Page).

[50] Madison posed this problem: "Suppose they instruct a representative, by his vote, to violate the constitution; is he at liberty to obey such instruction?" 1 Annals of Congress 738 (Aug. 15, 1789).

[51] 1 Annals of Congress at 744 ("I would tell them [the instructors] . . . it was unconstitutional; alter that and we will consider the point.") (Aug. 15, 1789) (Remarks of Mr. Page).

In short, petitioning was understood as directly rooted in popular sovereignty: it was to stand apart from, and serve as a check on, representative institutions. Just as the Constitution establishes checks and balances between branches of government, the right to petition establishes a checking balance between the people-at-large and government.

This petition/check was understood to be at least as important a mechanism of self-government as was the right to vote. Indeed, it had a far broader scope than the right to vote. Petitioning was in many circumstances the only way for citizens to participate directly in self-government. There were, for example, substantial limitations on who could vote, but none on who could petition. Because neither the President nor Senators were directly elected, petitioning was the only way citizens could exercise direct influence on a substantial portion of the government. Furthermore, although petitioning and voting are the two ways citizens participate directly in self-government, voting is only periodic, and is not usually on concrete issues. Voting is therefore not as useful as petitioning for checking or criticizing specific governmental actions or policies. Thus, petitioning against the appointment of a federal official was, and is, the functional equivalent of voting against the election of a federal official.

The Framers understood that any interference with the right to petition would threaten a self-governing people's ability to check and balance the organized institutions of government. The separate treatment of petitioning in the text of the First Amendment, as well as its description as a "right," demonstrate an intent to afford petitioning an even more protected role in our constitutional structure than it had enjoyed in England and colonial America. Read in the light of this history, the petition clause must be deemed to afford absolute immunity to petitioner's letters to the President.

II. BECAUSE PETITIONING SERVES THE CRITICAL FUNCTION OF ENABLING A SELF-GOVERNING PEOPLE BOTH TO INFORM GOVERNMENT AND TO CHECK ABUSES OF GOVERNMENTAL POWER, PRIVATE PETITIONS SHOULD BE AFFORDED THE SAME ABSOLUTE IMMUNITY FROM COMMON LAW LIBEL ACTIONS OTHER GOVERNMENT AND GOVERNMENT-RELATED FUNCTIONS ALREADY ENJOY.

As shown in Point I, historical analysis requires a rule of absolute immunity for petitioning. Functional analysis requires the same result. In our system of government, petitioning is the method by which ordinary citizens obtain direct access to government. It is the means by which citizens exercise their self-governmental functions of informing and checking government. (For early examples of the important checking and informing functions served by petitions, see the Appendix to this brief). These functions would be severely undermined if petitions could be subjected to state common-law libel actions.

The checking function served by petitioning is just as important to maintaining the balance between a limited government and the sovereignty of the people-at-large as are the internal checks and balances among the three branches of government or the balance between the national government and the states. Madison properly characterized this relationship: "If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress 934 (1794). That balance cannot be maintained if the checking function of the people-at-large is subject to common law libel actions brought by the officials of whose conduct they complain.

It would be fundamentally inconsistent with our system of government to afford the people less immunity when they exercise their self-governmental functions than is afforded executive, legislative and judicial officials when they exercise their governmental functions. Ac-

cordingly, the same degree of immunity from common law libel actions that protects executive, legislative and judicial officials should protect private petitioners. So long as their statements are arguably relevant to their governmental responsibilities—or are within the "outer perimeter" of those responsibilities—statements by officials of the executive,[52] legislative[53] and judicial[54] branches are absolutely immune from common law libel actions, even if those statements are alleged to be malicious or knowingly false. Absolute protection is afforded not because society wants to protect knowingly false and defamatory statements by officials of those branches, but because a lesser degree of immunity would subject government officials to the burdens and risks of litigation and would therefore chill and interfere with the performance of their governmental responsibilities. The prospect of litigation would have the same effect on private petitioners.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-283 (1964), immediately after citing *Barr v. Matteo*, 360 U.S. 564 (1959), which held that defamatory statements by federal executive branch officials are "absolutely privileged" from common law libel actions, this Court acknowledged that:

> "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer . . . . It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a *fair equivalent* of the immunity granted to the officials themselves." (emphasis added).

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[52] *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Yaselli v. Goff*, 12 F.2d 396 (1926); *aff'd per curiam*, 275 U.S. 503 (1927).

[53] *See Gravel v. United States*, 408 U.S. 606 (1972); *Prosser and Keeton, On Torts* 816 (1984), and the authorities cited therein.

[54] *Prosser and Keeton, supra* n. 53 at 820, and the authorities cited therein.

The statements at issue in *Sullivan* were protected only by the speech or press clauses. For those statements, made to the public at large, a qualified privilege was deemed a "fair equivalent." However, when the citizen is not speaking to the public at large, but is directly exercising his right to petition, and is thus performing a self-governmental function, the only "fair equivalent" of the absolute immunity from common law libel actions enjoyed by officials is absolute immunity for the petitioner. As the court ruled in *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923):

> "For the same reason that members of the Legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice are *absolutely immune* from actions, civil or criminal, *for libel* for words published in the discharge of such public duties, the individual citizens must be given a like privilege *when he is acting in his sovereign capacity.*" (emphasis added).[55]

Restrictions on the right to petition thus pose a real danger of shifting the locus of the "censorial" power from the people-at-large to government. Citizens who have personal knowledge of abuses of governmental power will not bring those abuses to the attention of other officials if to do so would subject them to the burdens, costs, and risks of litigation brought by the official of whom they complain. The Framers intended for petitioners to check governmental officials, not for governmental officials to check petitioners. Thus, if the right to petition for redress of grievances caused by abuses of governmental authority is to play its intended role in our system of checks and balances, it cannot be subject to any government-imposed restrictions.

Just as important as the checking function is the informing function, which would also be severely under-

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[55] This case was cited twice in *New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 291 (1964).

mined by any rule other than absolute immunity. This Court has emphasized that this informing function is a key element to the legitimacy of our representative institutions:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold at the same time, that the people cannot *freely inform* the government of their wishes . . . would raise important constitutional questions." *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 137-38 (1961) (emphasis added).

Historically, as noted above, petitions to the various branches of government all evolved from a common root, and the same rule of absolute immunity applied. In many areas, this has remained the rule. Thus, private citizens already enjoy absolute immunity from common law libel actions when they initiate or participate in certain governmental functions—*e.g.*, initiating or testifying in judicial proceedings, or informing government of suspected violations of federal criminal laws. In each instance, absolute immunity is provided, in part, because of the need to assure the decision-maker that he will receive complete and candid information. This is deemed more important than the injury to individual reputation that may arise from an occasional abuse of the process. Protecting the overall balance of the governmental structure from the chilling effect on would-be petitioners caused by the prospect of having to defend a libel action outweighs whatever individual injury may occasionally arise.

For this reason, all complaints to the judicial branch are absolutely immune from defamation actions, even

though some complaints will be knowingly false.[56] Where, as here, governmental redress can come only from the executive or legislative branches, history and functional analysis combine to require that petitions to those branches be afforded the same absolute immunity afforded petitions to the judicial branch. Indeed, in our system of separation of powers, it would be inappropriate for the courts to afford absolute immunity when citizens petition the judicial branch, but not when they petition the President or the legislative branch.[57]

Similarly, the governmental need for full access to information has produced the common-law rule of absolute immunity for witnesses in legislative hearings. See, *supra* n. 53. Indeed, petitioner had offered to testify at

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[56] So long as the allegations in the complaint are relevant to the proceeding, complaints are absolutely immune from defamation actions, even in North Carolina, and even if knowingly false. *E.g., Scott v. Statesville Plywood & Veneer Co., Inc.*, 240 N.C. 73, 81 S.E.2d 146 (1954); *Wilson v. Sullivan*, 81 Ga. 238, 7 S.E. 274 (1888); *Meyers v. Sullivan*, 53 Fla. 197, 44 So. 357 (1907); *Texas Co. v. C.W. Brewer Co.*, 180 S.C. 325, 185 S.E. 623 (1936); *School Dist. No. 11, Laramie Co. v. Donahue*, 55 Wyo. 220, 97 P.2d 663 (1939); *Lann v. Third National Bank*, 198 Tenn. 70, 277 S.W.2d 439 (1954); *Massenqele v. Lester*, 403 S.W.2d 697 (K. App. 1966), *cert. denied*, 385 U.S. 1019 (1967); and *Selas Corp. of Amemia v. Wilshire Oil*, 344 F. Supp. 357 (E.D. Pa. 1972) (applying Pennsylvania law). Ironically, if, after successfully defending against this action, petitioner were to sue respondent for defamation, alleging that respondent's complaint in this action was *itself* defamatory and knowingly false, petitioner's suit would be summarily dismissed.

[57] Although petitions to the executive or legislative branches may —like petitions to the judicial branch—occasionally contain "rhetorical hyperbole," or even untruth, the Court should not assume that the executive and legislative branches are incapable of determining the appropriate weight to give factual allegations in petitions. Officials of the executive and legislative branches (and certainly the recipients of petitioner's letters) have the sophistication, experience and resources to evaluate particular communications. Indeed, those branches have greater investigative resources (law enforcement agencies; staff investigators; etc.) than does the judicial branch, and much greater experience in evaluating comments about candiates for political office.

public hearings, JA 12, but no hearing was scheduled or held. If there had been a hearing, petitioner could have read the contents of his letters into the public record and he would have enjoyed absolute immunity, even though the alleged damage to respondent's reputation in the community would have been greatly increased by such public testimony. The same rule of absolute immunity should protect petitioners who do not have the option of a public hearing. Surely the Framers did not intend the right to petition to be dependent on a congressional decision to schedule a public hearing. Indeed, many of the issues about which citizens might be expected to petition would not even be appropriate for public hearings.

These considerations show that any government-imposed restriction on petitioning is inconsistent with our constitutional structure. But *state*-imposed restrictions on the right to petition the national government are particularly intolerable. Petitioning has consistently been described by the Court as "among the most precious of the liberties guarded by the Bill of Rights," *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and as a right which "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The right to petition is a core right of national citizenship. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). State laws that restrict the content of petitions submitted directly to the national government present the same insurmountable problems of federalism addressed by this Court in *Crandall v. Nevada*, 73 U.S. 35 (1867), which held unconstitutional a one dollar state tax levied upon each person leaving the state on public transportation. The Court held that even this *de minimis* financial restraint was wholly incompatible with the constitutional structure of national government:

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested . . . that government has a right to call to [Washington, D.C.] any or all of its citizens to aid in its service . . . and this right cannot be made to depend upon the pleasure of a state . . . But if the government has those rights on her own account, the citizen also has correlative rights. . . . [A]nd this right is *in its nature independent of the will of any state* . . . ." *Id.* at 43-44 (emphasis added).

Similarly, the right to petition the national government is "in its nature independent of the will of any state" and can tolerate no direct state interference.

In the context of federal law enforcement, this Court has long affirmed that a citizen's communications to the national government cannot be subject to state restriction. In 1895, the Court stated:

> "It is [every citizen's] right and his duty to communicate to the executive officers any information which he has of the commission of an offense against [federal] laws . . . ." *In re Quarles*, 158 U.S. 532, 536 (1895).

From this premise, the Court concluded not only that Congress could pass laws to protect this federal right, but also that "such information, given by a private citizen, is a privileged and confidential communication for which *no action of libel or slander will lie* . . . ." *Id.* at 535-36.[58] The basis of this absolute immunity for the content of such communications to federal officials was found in the very structure of constitutional government. Echoing *Cruikshank*, *supra*, the Court stated that this privilege "arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *Id.* at 536.

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[58] *See also Vogel v. Gruz*, 110 U.S. 311 (1884).

Quarles finds the immunity for citizen communications to the federal government to be analogous to, and, just as strong as, that of the government officials whose responsibilities include responding to those communications:

> "The right of a private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice stand upon the same ground, just as do the rights of citizens voting and of officers elected . . . ." *Id.* at 536.

The "right and duty to communicate" regarding violations of federal criminal statutes is an important use of the right to petition, but there is no reasoned basis for affording the absolute immunity from libel actions recognized in *Quarles* only to petitions concerning violations of federal criminal statutes. The citizen's right and duty to participate in government is not defined or exhausted by federal criminal statutes. The rule of absolute immunity from state common law libel actions must extend, therefore, to every petition directed to national government that raises before appropriate officials issues relevant to national governance. The petitions in this case squarely meet this standard.

III. IN THE CIRCUMSTANCES OF THIS CASE, A BALANCING OF FEDERAL AND STATE INTERESTS REQUIRES ABSOLUTE IMMUNITY.

As shown in points I and II, historical and functional analysis combine to demonstrate that states do not have a constitutionally permissible interest in subjecting petitions to the federal government to any restraint whatsoever. Should the Court decide, however, that resolution of the scope of immunity appropriate in this case requires a balancing of federal and state interests, in the circumstances of this case, the federal interests are so strong and the state interest is so attenuated that the state interest cannot be deemed sufficiently compelling to justify the chilling effect it would have on the federal right to petition.

A. For Ordinary Citizens, The Prospect Of Having To Defend Against A Common Law Libel Action Would Substantially Chill Exercise of The Right To Petition.

This Court has consistently recognized that the threat of a substantial damages award or of substantial defense costs—and certainly of both—will cause some would-be critics of official conduct to "self-censor" their remarks entirely, and will cause others to steer far wide of any arguably unprotected remarks. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964):

> "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.* They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v Randall, supra, 357 US, at 526, 2 L ed 2d at 1473. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." (Emphasis added.)[59]

In recent years, the damages awarded in libel cases, and the costs of defending such cases, have each become very substantial.[60] The risk of huge damage awards and

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[59] *See also Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 103 S. Ct. 2161, 2169 (1983); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Time, Inc. v. Firestone*, 424 U.S. 448, 475 (1976) (Brennan, J., dissenting); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979) (purpose of the speech or debate clause is to protect legislators "not only from the consequences of litigation's results but also from the burden of defending themselves."). *See generally, L. Tribe, American Constitutional Law* § *12-12* 634 (1978).

[60] Members of this Court have recognized the alarming escalation of the costs of pre-trial discovery in civil litigation. *E.g.*, Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 *F.R.D.* 83, 95-96 (1976). And one member of this Court has noted that the "potential for abuse of liberal discovery procedures is of particular concern in the defamation context," where discovery can

the certainty of huge defense costs have been so widely reported that no informed citizen could be ignorant of the risks and costs of libel actions.[61]

Huge damage awards and defense costs obviously exert a chilling effect on the press.[62] But the chilling effect on ordinary citizens is likely to be even greater.[63] The press has both financial and institutional incentives to speak, despite the risk of libel suits. For the press, speech

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readily be used for the "in terrorem" purpose of deterring speech. *Herbert v. Lando*, 441 U.S. 153, 204-05, n. 1 (1978) (Marshall, J., dissenting) (citing authorities).

[61] For illustrations of this point, written for a lay audience, see Lewis, *Annals of Law: The Sullivan Case, The New Yorker* 52 (Nov. 5, 1984): "As important as the threat of large damages is the reality of high costs; they have risen even more precipitously in libel cases than in litigation generally. Nowadays, each side in a major libel action that goes to trial can expect lawyers' fees and other expenses in the millions of dollars." *Id.* at 52. Lewis reports that "in more than twenty recent libel cases, juries have awarded the plaintiffs damages of a million dollars or more . . . ." *Id.* at 78. Lewis cites a Libel Defense Resource Center survey of "damage judgments awarded in eighty libel trials between 1980 and 1983 [which] showed that the average award was $2,174,633," which was "triple the average award in a survey of medical-malpractice cases . . . ." *Id.* at 79. For additional examples, see *E. Pell, The Big Chill* 159-88 (1984).

[62] Judge Robert Bork, noting the chilling effect caused by "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards," and noting that "those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments," has suggested, without holding, that absolute immunity might be required in some circumstances even for the press. *Ollman v. Evans*, —— F.2d —— (D.C. Cir. 1984) (Bork, J., joined by Wilkey, Ginsburg and MacKinnon, JJ., concurring, slip op. pp. 7, 1, and 2).

[63] Lewis, *supra* n. 61, at 78: "CBS and other corporate giants can afford to litigate against libel claims. Smaller defendants may find the cost ruinous." For examples where the press and other media have actually been deterred from publishing news because of the possibility of a libel action, see *id.* at 82; and *E. Pell, supra* n. 61, at 167-168.

is, at least in part, a business. Libel suits are a foreseeable risk and cost, often deductible, of that business. Commonly, the press will purchase libel insurance to cover some or all of the costs of defense, and of an award of compensatory damages.[64] But more than two-thirds of all libel defendants are private citizens and non-media defendants, most of whom do not have libel insurance.[65] Even if such defendants ultimately prevail, they must absorb the entire cost of their defense.[66]

If this Court does not afford ordinary citizens absolute immunity from common law defamation suits involving private petitions to the federal government, the inevitable consequence will be a particularly severe restraint on the right to petition. Just as allowing a defense of truth "does not mean that only false speech will be deterred," *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), requiring a libel plaintiff to prove knowing falsity does not mean that only knowingly false petitions will be deterred. A mere *claim* of knowing falsity will subject ordinary citizens to the certainty of substantial costs (and the risk of enormous damages), even if a jury ultimately determines that every word in their petitions had been true. Such a ruinous prospect would effectively operate as a prior restraint. The "right" to petition would be meaningless if ordinary citizens knew they

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[64] Because of state laws, it is almost impossible for the press (or for an individual) to insure against punitive damage awards. See generally, *E. Pell, supra* n. 61, at 164-65 (noting a two year study of libel actions finding "17 punitive awards of a quarter million or more," and noting that "no insurance can be purchased that is guaranteed to cover these damages . . .").

[65] Between January 1976 and June 1979, approximately 70% of the defendants in all reported defamation cases were non-media defendants. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 *Am. Bar Found. Research J.* 455, 497.

[66] Petitioner knew, from first-hand experience, how expensive it can be to defend against a claim of malicious defamation. JA 11. *See supra*, n. 6, and accompanying text.

could be required to pay $20,000, or more, for the privilege of writing a letter to their President.[67]

In recognition of that chilling effect, and its adverse consequences not only for citizens but also for the federal government, the United States appeared as *amicus* in *Webb v. Fury*, 282 S.E.2d 23 (W. Va. 1981), and successfully urged that court to afford absolute immunity, based on the petition clause, to citizens sued for libel because of their communications to federal agencies. The United States argued that qualified immunity would be inadequate because "the threat of a defamation suit will effectively chill the exercise of the right to petition. Unless the right to petition is privileged against suits such

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[67] One author estimated that in 1975—before the costs of defending libel actions began to escalate—the cost of defending a libel action ranged from $20,000 to $100,000. Anderson, *Libel and Press Self-Censorship*, 53 *Texas L. Rev.* 422, 435-36 (1975). The chill created by the prospect of defending against a common law libel action does not evaporate because of the theoretical possibility of obtaining early summary judgment. Although petitioner did, after "extensive" and costly discovery (*see* n. 6, *supra*), obtain summary judgment in the earlier defamation suit filed against him (where respondent represented the plaintiff), that case was decided before this Court held in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), that an action requiring proof of knowing or reckless falsity "calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *See also, Hall v. Piedmont Publishing*, 46 N.C. App. 760, 266 S.E.2d 397 (1980) (summary judgment on the issue of actual malice is inappropriate in a suit brought by a public figure). In other defamation cases where actual malice was alleged, summary judgment has been found inappropriate even though pre-trial discovery had produced extremely comprehensive factual records. See *Herbert v. Lando*, 441 U.S. 153 (1979); *Westmoreland v. CBS*, —— F. Supp. —— (S.D.N.Y. 1984); *Sharon v. Time Inc.*, —— F. Supp. —— (S.D.N.Y. 1984). *See generally Briscoe v. LaHue*, 460 U.S. 325, 343, n. 29 ("summary judgment is usually not feasible" when "the central issue will be the defendant's state of mind"). Petitioner could establish the truth of many of the statements in his letters through reference to court records (see n. 5 and n. 6, *supra*), but many others would require extensive discovery and would turn on evaluations of the testimony and credibility of numerous witnesses, making summary judgment unlikely.

as [plaintiff's], it will lose any real meaning because private citizens will be deterred by the threat of litigation from exercising the right." [68]

B. In The Circumstances Of This Case, Anything Less Than Absolute Immunity Would Substantially Interfere With Several Important Federal Interests.

Subjecting petitioner to a common law libel action would interfere with so many federally protected interests that we will present them with only brief elaboration.

1. *Absolute immunity is required to protect federal officials from discovery and from judicial inquiries that would substantially interfere with the performance of their duties.*

Respondent alleges that his reputation was injured among the recipients of petitioner's letters, and that, as a consequence, he was not appointed U.S. Attorney. JA 5-7. Petitioner has denied those allegations. If this action is allowed to proceed, the truth of those allegations could only be determined through the testimony of the recipients. Thus, it would be necessary for respondent, petitioner, or both, to take the depositions of President Reagan, Senator Helms, etc., in order to find out whether

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[68] Reply Brief for the United States as *Amicus Curiae* in *Webb v. Fury, supra*, at 13. See also *id.* at 11 ("To allow a plaintiff to simply plead bad faith would create a chilling effect on the exercise of the right to petition."). And see Brief for the United States as *Amicus Curiae* in *Webb v. Fury, supra*, at 31, 34 ("A final constitutional protection afforded Webb, in addition to those discussed above, is the First Amendment right to petition the Government for a redress of grievances . . . . Persons who provide information to the federal government under these statutes [the Clean Water Act and the Surface Mining Act] should not be required to risk the possibility of a lawsuit and liability. The realization of the goals of these statutes requires an absolute privilege.") More recently, the House Joint Leadership has submitted a brief *amici curiae* urging recognition of an absolute privilege for communications from citizens to Congress. See Memorandum of the House Joint Leadership as *Amici Curiae*, dated June 14, 1982, submitted in *Webster v. Sun Company, Inc.* (D.D.C. No. 81-2867). See also the Supplemental Memorandum of the House Joint Leadership as *Amici Curiae*, dated July 6, 1984, submitted in the same case.

they read the letters; whether they believed the letters; who they contacted and what they did, if anything, to evaluate the truthfulness of the letters; what they found to be true as a result of those inquiries; whether the letters played any role in their decision and, if so, how much of a role; etc.[69]

Those depositions could cause the recipients of petitioner's letters to be absent from their official duties for considerable periods of time, and would necessarily probe deeply into the subjective and political considerations on which the decision not to appoint respondent was based.[70] The Court has held, largely for those reasons, that federal officials must be afforded absolute immunity from common law libel actions when they are sued directly.[71] The Court has not had occasion to decide whether the same federal officials would be immune from testifying as witnesses in common law libel actions. A rule affording the recipients of petitioner's letters a testimonial privilege from testifying in this action, where they are involved only as witnesses, not as defendants, would protect those officials, but it would deny petitioner a fair opportunity to rebut the allegations of the complaint. On the other hand, requiring the recipients to testify as witnesses would interfere with many of the same interests on which their absolute immunity as defendants is based. These problems will *always* arise in cases gov-

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[69] In fact, respondent noticed and has already taken the deposition of Rep. Johnston, his former law partner, which showed that Rep. Johnston's support for respondent's nomination "did not waiver or change" because of petitioner's letter. Transcript of Deposition of W. Eugene Johnston, III, June 28, 1982, p. 42. Indeed, Rep. Johnston acknowledged that he had been accurately quoted as having said "I think a lawsuit makes no sense at all, because [petitioner's] letters had no influence on me, or anyone else to my knowledge." *Id.* at 51.

[70] It was Rep. Johnston's opinion, for example, that "the need for a geographical balance . . . was a factor" in the decision not to appoint respondent. *Id.* at 50-51.

[71] See notes 52-54, *supra*.

erned by the petition clause, where, as here, the sole recipients of an allegedly defamatory communication are high federal officials.[72]

2. *Absolute immunity is required so that federal officials will receive factually relevant information concerning candidates for appointment to federal office.*

The federal government has a substantial interest in ascertaining the fitness of candidates for appointment to high federal office, and, therefore, an interest in encouraging and receiving candid communications about such candidates, particularly from those citizens—necessarily few in number—who have relevant first-hand information.

The President could not adequately fulfill his constitutional responsibility for nominating individuals to the office of U.S. Attorney if he did not have as much information as possible regarding the qualifications of the candidates.[73] The Federal Bureau of Investigation could not adequately perform background investigations if it could not receive candid communications from informants.[74] The Senate must have access to as much information as possible regarding the qualifications of a presidential nominee if it is adequately to perform its con-

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[72] By contrast, these kinds of problems will almost never arise in cases governed by the speech or press clauses, because the injury to reputation in such cases is almost always among the general public.

[73] That position requires nomination by the President and confirmation by the advice and consent of the Senate. 26 U.S.C. § 541 (1976).

[74] The F.B.I. performs background investigations on candidates for the office of U.S. Attorney. *See* E.O. 10450, *printed at* 5 U.S.C. § 7311 note (1976); 29 C.F.R. § 0.85(c) (1981); 46 Fed. Reg. 60321 (1981). Such investigations may be conducted on a confidential basis at the informant's request, *see* 5 U.S.C. § 522a(a)(k)(5) (1976), and the file prepared by the Bureau often contains unsubstantiated, untrue, and possibly defamatory allegations.

stitutional responsibility of advising and consenting to the nomination.[75]

In *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), this Court ruled that "anything which might touch on an official's fitness for office is relevant." And in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971), this Court ruled that the broad rule of relevance formulated in *Garrison* applied "with special force to the case of the candidate," as here, because "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." [76]

All the facts in petitioner's letters would at least "touch on" respondent's fitness for the office of U.S. Attorney, and most would be highly relevant.[77]

3. *Absolute immunity is required so that federal officials will receive politically relevant information concerning candidates for appointment to federal office.*

Appointing officials have a substantial *political* interest in learning how citizens feel about candidates. If a

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[75] *See* n. 73, *supra*. It is particularly important to immunize citizen communications about appointed officials, because those officials are less likely to be subjected to widespread media and public scrutiny than are elected officials.

[76] It further held "as a matter of *constitutional law* that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*." *Id.* at 277 (emphasis added). *See also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). By fashioning this special rule of evidence, this Court once again showed its willingness to afford special protections when necessary to safeguard First Amendment rights. See Point IV, *infra*.

[77] For example, if respondent was known among the constituency as "Mad Dog Smith," JA 9, his appointment as U.S. Attorney would not inspire confidence in the impartial and even-handed administration of that office. If he had shown a lack of regard for civil rights, if he had summarily imprisoned a black attorney, if he had ignored federal court orders to produce relevant documents, all of that would have been relevant to his fitness for the office he sought.

candidate for appointment to federal office is held in contempt by the citizens who would be under his jurisdiction, that fact is relevant to the political appointment decision because officials can be expected to govern more effectively if they have the respect of the governed. Even a knowingly false petition conveys this sort of *politically relevant* information. Petitions have, and should have, political consequences, regardless of the motives of the petitioner, just as votes have and should have political consequences, regardless of the motives of the voter.[78]

4. Absolute immunity is required to further the federal interest in the peaceful resolution of grievances involving the national government.

There is a strong federal interest in providing an orderly way to seek redress of "grievances" so citizens will not resort to violence, or even insurrection. The Framers knew, as the Declaration of Independence asserted, that England's disregard of colonial petitions seeking redress from "oppressions" had been a major justification for the American Revolution. The petition clause was drafted with that history of "oppressions" in mind, and was not designed to protect only the communication of neutral facts by disinterested on-lookers. The history of petitions, and the very phrase "redress of grievances," plainly reveal that the Framers expected strongly and even bitterly held views to be communicated to government. A "grievance," by its very nature, is likely to provoke intense feelings, and intense language. Persons "aggrieved" by abuses of governmental power cannot be expected always to express their grievance in temperate language. The Framers knew that a petition from an outraged citizen alleging that he was personally ag-

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[78] In the context of the speech and press clauses, where the primary theoretical model is the competition for *truth* in the marketplace of ideas, this Court has said that no constitutional value is served by communication of knowingly false statements. But truth is not the only value served by petitioning. Communications protected by the petition clause serve the constitutional value of enabling citizens to participate in self-government, whether those communications are knowingly false or not.

grieved by an official abuse of power would quite often be defamatory under common law standards. But the Framers were not as concerned about abuses of rights by self-governing citizens as they were about abuses of power by representative officials. Occasional abuses of the right to petition were seen as an unavoidable cost of self-government. As Madison said, "[s]ome degree of abuse is inseparable from the proper use of every thing . . . ." [79]

5. Absolute immunity is required to enable citizens to participate in self-government.

Finally, of course, is the general interest embodied in the petition clause itself, which enables citizens to participate in self-government by informing government and by checking abuses of governmental power. That interest has been fully described above. It applies with particular force in the circumstances of this case because petitioner was petitioning against the appointment of an individual who was seeking appointment to a high federal office that would have given him direct and substantial governmental power over petitioner. Because petitioner could not vote against that appointment, petitioning was the only way he could participate in the decision-making process.

C. In The Circumstances Of This Case, The State Interest In Protecting Individual Reputation Is Greatly Attenuated.

The only state interest to be weighed against these substantial federal interests is its interest in compensating victims of defamation: "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). *See also Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967). That state interest is greatly weakened

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[79] 4 *Elliot's Debates on the Federal Constitution* (1876), p. 571, *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964), and in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *See also, City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86, 91 (1923).

where, as here, the individual is a candidate for public office, because candidates, even more than public officials, have voluntarily subjected their reputations to scrutiny.[80] The state interest is further attenuated where, as here, the candidate's reputation is diminished, if at all, not in the local community, but only in the minds of a few federal officials.

Accordingly, in the circumstances of this case, the state's negligible interest in compensating a candidate for federal office for alleged injury to his reputation is not sufficiently compelling to outweigh the very substantial federal interests that would be undermined by subjecting petitioner to the certain and substantial costs of a common law libel action.

Even in circumstances less compelling than here, several courts have decided, after noting the chilling effect on the right to petition posed by defamation actions, that the federal interests protected by the petition clause outweigh the state interest in protecting reputation. They have therefore ruled that petitioners enjoy absolute immunity from common law defamation actions, even when their petitions are alleged to be knowingly false and malicious. *E.g.*, *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981); *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601 (Md. 1983), *affirming*, 53 Md. App. 553, 456 A.2d 59 (1983); *Bass v. Rohr*, 57 Md. App. 609, 471 A.2d 752 (1984), *cert. dismissed as improvidently granted*, — Md. —, 484 A.2d 275 (1984); *Miner v. Novotny*, 481 A.2d 508 (Md. Spec. App. 1984). *See also*, *Rudnick v. Harsha*, 470 F. Supp. 285, 297 (M.D. Pa. 1978) (right to inform is analogous to the right to petition, and in-

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[80] *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 345 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971). Indeed, in *Monitor* the Court remarked that "[*i*]*f actionable defamation is possible in this field*, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits," 401 U.S. at 274 n. 4 (quoting Noel, *Defamation Of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949)) (emphasis added).

forming cannot be the basis of a defamation action despite an allegation of malice); *Campo v. Rega*, 79 A.D. 2d 626, 433 N.Y.S.2d 630 (2nd Dept. 1980) (complaint concerning police officer absolutely immune from action for defamation).

In addition, the importance of the federal interests protected by the petition clause have led this Court—and many others—to limit the reach of competing state and even federal interests so they would not intrude on petitioning activity, regardless of the subjective motives of the petitioner. *E.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D.N.Y. 1979); *City of Long Beach v. Bozek*, 31 Cal.3d 527, 187 Cal. Rptr. 86, 645 P.2d 137 (1982), *vacated and remanded on issue of independent state grounds*, 459 U.S. 1095 (1982), *aff'd on state constitutional grounds*, 33 Cal.3d 727 (1983); *Smith v. Silvey*, 149 Cal. App. 3d 400, 197 Cal. Rtpr. 15 (Cal. App. 2 Dist. 1983).

A rule of absolute immunity is particularly appropriate in the circumstances of this case.

IV. EVEN IF THE INTERESTS PROTECTED BY THE PETITION CLAUSE DO NOT REQUIRE ABSOLUTE IMMUNITY FROM COMMON LAW LIBEL ACTIONS, THEY DO REQUIRE ADDITIONAL PROTECTIONS, INCLUDING JUDICIAL DISCRETION TO AWARD COSTS AND FEES TO PREVAILING DEFENDANTS.

The petition clause must have some meaning different from the speech or press clause if it is not to be reduced to mere surplusage. If petitions are not absolutely im-

mune from suit, the Court should at least afford special protections in order to minimize the risk that legitimate petitioning will be chilled by the fear of vexatious and costly litigation.

A. This Court Has Consistently Recognized The Need For Special Procedural And Substantive Protections To Safeguard First Amendment Values.

This Court has held in a variety of contexts that special protections are necessary in order to safeguard the values protected by the First Amendment. Indeed, the judge-made requirement that public figure plaintiffs must allege and prove knowing or reckless falsity in libel cases is such a special rule "designed to preserve the robust exchange of ideas and information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d 28, 47 (W. Va. 1981) (Neely, J., dissenting). The Court has also ruled that knowing or reckless falsity must be shown not only by the preponderance of the evidence, but with "the convincing clarity which the constitutional standard demands . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 286-87 (1964).

This Court does not ordinarily re-examine the factual findings of state courts. But when it is claimed that the state has denied a right protected by the First Amendment, the Court conducts its own review of the record.[81] Similarly, although an individual ordinarily may not challenge a statute on constitutional grounds if the statute would be constitutional as applied to him, in the First Amendment context, a statute can be challenged on its face for overbreadth.[82] And in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), the Court adopted a special

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[81] *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964). *See also Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, *petition for rehearing denied*, 104 S. Ct. 3561 (1984) (citing cases); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971).

[82] *See, e.g., Coates v. City of Cincinatti*, 402 U.S. 611 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Kunz v. New York*, 340 U.S. 290 (1951).

rule of relevance to govern libel actions brought by candidates for public office.

In sum, this Court has afforded special safeguards whenever necessary to ensure that important First Amendment values are not infringed.

B. The Interests Protected By The Petition Clause Require Special Protections For Defendants In Libel Cases Governed By The Petition Clause.

Defendants sued for libel based on petitioning activity should be entitled, either automatically or at least in the trial court's discretion, to recover reasonable attorneys' fees and costs from unsuccessful plaintiffs.[83] This rule would significantly reduce frivolous or "strike" suits. It would also reduce, although not eliminate, the chilling effect that fear of liability has on potential defendants, while permitting plaintiffs who are actually injured to recover damages.

The Court should also require that allegations of malice be supported by specific factual allegations in the complaint, sufficient of themselves, unless rebutted, to support a finding of knowing falsity or reckless disregard, and should adopt more lenient standards for granting summary judgment to petitioners.[84]

Finally, the state's interest in compensating victims of defamation for actual injury to their reputations is not sufficient to justify the additional chilling effect created by the prospect of punitive damages. Victims of defamation do not need punitive damages in order to be made financially whole, or to vindicate their reputations.[85] The sole purpose of punitive damages is deterrence. But de-

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[83] *See Webb v. Fury*, 282 S.E.2d 28, 43-48 (W.Va. 1981) (dissenting opinion).

[84] *See id.* at 47 (dissenting opinion).

[85] Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

terring libel in this context will necessarily deter legitimate petitioning as well, and the state does not have a legitimate or compelling interest in deterring citizens from exercising their governmental right and duty to petition the federal government. The Court has recognized that the prospect of punitive damages "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). At minimum, therefore, the Court should hold that petitions to the federal government are absolutely immune from common law actions for punitive damages, and should limit the plaintiffs in such actions to recovery of actual damages.[86]

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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[86] *See generally* Anderson, *Reputation, Compensation and Proof*, 25 *Wm. & Mary* L. Rev. 747, 749 (1984).

APPENDIX

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Early Examples of the Checking and Informing Functions Served by Petitions

Two early examples illustrate the central function of the right to petition in the constitutional structure of self-government. The first—the response to the Alien and Sedition laws—illustrates the checking or negative function of the right of petition; the second—the abolitionists' petitioning campaign—illustrates the informing or positive function of petitioning. Both are critical components of a constitutional system designed to maintain sovereignty in the people.

Passage of the Alien and Sedition Acts in 1798 triggered the first sustained petitioning activity under the new constitution. The Sedition Act made it a crime to "write, print, utter or publish . . . any false, scandalous and *malicious* writing or writings against the government of the United States, or either House of Congress . . . or the President . . . with *intent to defame* . . . or to bring them . . . into contempt or disrepute." 1 Stat. 596 (emphasis added). Although never directly reviewed by this Court, this attempt to shield government from "malicious" criticism has been found unconstitutional "in the court of history." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). That the historical response to this unconstitutional attempt to still the expression of political grievances took the form of petitioning was both appropriate and revealing: appropriate because the Act was itself invoked to limit the right to petition;[1] revealing because of the scope of petitioning activity.

Two state legislatures—Virginia and Kentucky—passed resolutions/petitions protesting against the Acts as "pal-

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[1] In New York State, Jedidiah Peck was arrested and indicted for circulating a petition to Congress seeking repeal of the Alien and Sedition Acts. *United States v. Jedidiah Peck*, Sept. 4, 1799, RG 21 (National Archives) (manuscript indictment). The case is discussed in *J. Smith, Freedom's Fetters* 390-98 (1966).

pable and alarming" infractions of the Constitution.[2] The Virginia petition specifically invoked the sovereign authority of the people—and of the states—to oppose unconstitutional actions by the federal government:

> "The General Assembly doth solemnly appeal to like dispositions in the other states, in confidence that they will concur with this commonwealth in declaring . . . that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken . . . in maintaining, unimpaired, the authorities, rights, and liberties reserved to the states respectively, or to the people." 4 *Elliot's Debates On The Federal Constitution* (1876) at 578.

Private citizens and aliens[3] also protested the Acts through petitions to Congress.[4] In response to Federalist efforts to reject all petitions on this subject, Rep. Gallatin accused the House of unconstitutionally claiming a "power of defining the nature of petitions . . . [of claiming] that there are certain points which the people may not touch."[5]

Thus, in the first major constitutional crisis in American history, petitioning was the mechanism used by states, citizens and aliens to assert the priority of the constitution, and the people's claim to ultimate sovereignty. Ap-

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[2] The Virginia petition stated that normal petitioning procedures were to be followed: copies were to "be furnished to each of the senators and representatives representing this state in the Congress of the United States." 4 *Elliot's Debates on the Federal Constitution*, 529 (1876).

[3] Resident aliens deluged Congress with petitions protesting the provisions of the Alien Act and the Naturalization Act. *See* discussion in *D. Smith, The Right To Petition For Redress of Grievances: Constitutional Development And Interpretations* 117-18 (1971) (University Microfilms) (unpublished thesis).

[4] See, *e.g.*, 9 Annals of Congress 2934-35 (Feb. 20, 1799) (Rep. Livingston); *id.* at 2957-58 (February 22, 1799) (Rep. Bard); *id.* at 2959 (Feb. 22, 1799) (Rep. Gallatin).

[5] *Id.* at 2958. After this accusation, his motion to refer all the petitions to a select committee passed. *Id.* at 2959.

propriately, the object of these petitions were laws that themselves threatened the right to petition and the balance of power between government and the people.

Interference with the right to petition was also intimately associated with the constitutional crisis over slavery. Because petitioning was the principal way abolitionists attempted to influence governmental policy, "the problem of freed and fugitive slaves became intertwined with the right of petition." [6]

In 1790, the first petition seeking the abolition of slavery was presented to the House of Representatives.[7] Petions for the abolition of slavery continued to be filed over the next forty years, culminating in the 1830's with a massive petitioning campaign to abolish slavery in the District of Columbia.[8] The House of Representatives responded by passing a series of "gag rules," under which petitions concerning slavery were, "without being either printed or referred . . . laid upon table and . . . no further action whatever [could] be had thereon." Register of Debates 4052 (May 26, 1836). These rules, which were passed by successive Congresses until 1844, were vigorously attacked by the abolitionists, including John Quincy Adams: "I hold this resolution to be a direct violation of the Constitution of the United States, of the rules of this House, and of *the rights of my constituents.*" Register of Debates 4053 (May 26, 1836) (emphasis added). Typical of these attacks was that of Sen Morris:

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[6] *D. Smith, supra* n. 3, at 81.

[7] 2 Annals of Congress 1182-83 (Feb. 11, 1790). Benjamin Franklin, as President of the Pennsylvania Abolition Society, filed one of these early petitions.

[8] The dimensions of this campaign are startling: petitions containing more than 34,000 signatures were received by the House during the first session of the 24th Congress; that number increased to 110,000 in the second session, and to over 300,000 in the 1837-38 session. *D. Smith, supra* n. 3, at 98 (*citing H. Von Volst, The Constitutional and Political History of the United States* 284 (1888)).

> "Is not the right of petition a fundamental right? I believe it is a sacred and fundamental right, belonging to the people, to petition Congress for the redress of grievances. While this right is assured by the Constitution, *it is incompetent to any legislative body to prescribe how the right is to be exercised, or when, or on what subject*; or else this right becomes a mass mockery." [9]

These two examples from American constitutional history give concrete meaning to the Framers' understanding that petitioning is a direct expression of popular sovereignty parallel to, but outside, the legislative authority of Congress.

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[9] *I. Benton, Thirty Years View* 612 (1856), quoted in *D. Smith, supra* n. 3, at 95-96 (emphasis added). The proponents of slavery recognized the importance of the abolitionists' petitions:

> "The Senators from the slaveholding States, who most unfortunately have committed themselves to vote for receiving these incendiary petitions [to abolish slavery in the District of Columbia], tell us that whenever the attempt shall be made to abolish slavery, they will join us . . . . they are now called on to redeem their pledge . . . the war which the abolitionists wage against us . . . is a war of religious and political fanaticism . . . We must meet the enemy on the frontier, on the question of receiving [the petition]; we must secure the important pass—it is our Thermopylae." Register of Debates 774-75 (Mar. 9, 1836) (Sen. Calhoun).

Calhoun clearly recognized that if slavery was to be preserved, government would have to subvert the right to petiiton.